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No. 81-62

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

E. HOWARD HUNT, JR., *Petitioner,*

v.

WILLIAM O. BITTMAN, *et al., Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Court of Appeals erred in its unanimous *per curiam* affirmance of the District Court's "painstaking opinion," based on undisputed facts established in a record developed after exhaustive discovery, holding that petitioner's diversity suit for legal malpractice was barred by the local District of Columbia statute of limitations applicable to such claims?

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### STATEMENT OF THE CASE

**1. Introduction**

Petitioner in this case, E. Howard Hunt, Jr., is a self-confessed felon and perjurer whose criminal conviction for burglary and conspiracy in the Watergate affair, based on his plea of guilty, was unanimously affirmed in a 1975 *per curiam* opinion by the U.S. Court of Appeals for the District of Columbia Circuit, sitting *en banc*, *United States* v. *Hunt*, 168 U.S. App. D.C. 374, 514 F.2d 270 (1975). The Court of Appeals in that case upheld the validity of Hunt's guilty plea in the Watergate case and observed that Hunt had admitted that:

> "he not only participated in the burglary of the DNC offices, but also that he participated in a con-

spiracy to suppress evidence of that burglary involving perjury and destruction of records." *Id.* at 375 n.3, 271 n.3.

In the present litigation Hunt turned against his former attorneys, respondents Bittman and the firm of Hogan & Hartson — over five years after the Watergate break-in took place and more than four years after they had ceased representing him — to claim that his criminal conviction and resulting imprisonment were counsel's fault. He brought the present diversity action in the U.S. District Court for the District of Columbia on September 30, 1977 for alleged legal malpractice during their representation of him in the original Watergate case. After the parties engaged in over a year of exhaustive discovery, extensive briefing, and oral argument on the statute of limitations issue, an experienced District Judge, the Honorable Oliver Gasch, dismissed plaintiff's lawsuit, on the ground that it was time-barred by the applicable District of Columbia three-year statute of limitations. (Pet. App. A 1a-19a.)[1]

In dismissing the case on the plenary record before him, Judge Gasch followed and applied authoritative precedents of both the District of Columbia Court of Appeals and the U.S. Court of Appeals for the District of Columbia Circuit. Judge Gasch held, on the basis of undisputed and indisputable facts, derived from court records, Hunt's own statements, and contemporaneous documents, that Hunt knew about each of the claims he was asserting more than three years — the length of the applicable local statute of limitations — before filing his suit. (Pet. App. A 7a-18a.)

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[1] The opinion and judgment below are contained in appendices to the Petition and will be cited as Pet. App. _____. The Petition will be cited as Pet. _____. The Joint Appendix below will be cited as J.A. _____.

On appeal, after full briefing and oral argument, a unanimous panel of the U.S. Court of Appeals for the D.C. Circuit, consisting of Circuit Judges Wright, Tamm, and Ginsburg, affirmed *per curiam*. After giving the issues on appeal full consideration, the Court stated that "the issues presented occasion no need for an opinion," and affirmed the dismissal of the suit on the basis of the "District Court's painstaking opinion." (Pet. App. B 1b-2b.) Petitioner sought rehearing and filed a suggestion for rehearing *en banc*. Both were unanimously denied, not a single member of the full Court requesting that a vote be taken on the suggestion for rehearing *en banc*. (Orders denying rehearing and rehearing *en banc*, April 8, 1981.)

Petitioner has now come to the end of the road in his lengthy vendetta against his former attorneys. Not only was his suit plainly barred, as every judge who has considered the case agrees, but the question tendered to this Court is of the most narrow, limited, and localized scope, involving the application of a provision of a District of Columbia statute of limitations to the facts of a particular diversity case.

**2. Background Of The Lawsuit**

The relevant facts about the background of Hunt's malpractice suit are established by court records, Hunt's own statements, and contemporaneous documents, and petitioner does not and cannot challenge Judge Gasch's recital of them. (Pet. App. A 2a-6a.) The Watergate break-in occurred June 17, 1972. Hunt, who had retained Bittman and the firm of Hogan & Hartson to represent him several weeks after the break-in, was indicted in September 1972 on six counts of conspiracy, burglary, and illegal interception of oral and wire com-

munications. After respondents had undertaken intensive efforts to defend him against the indictment, detailed in the record before Judge Gasch, Hunt advised his lawyers in December 1972 that, in view of the overwhelming amount of evidence against him and the recent death of his wife, he wished to plead guilty. He said that he was willing to plead guilty to any or all of the charges against him. (Pet. App. A 3a.)

In January 1973, Bittman succeeded in negotiating a plea to three of the six counts, and the prosecution agreed to a dismissal of the remaining three counts. (Pet. App. A 3a-4a.) Judge Sirica, however, refused to accept a plea to less than all the counts because of the strength of the government's case against Hunt and the public interest in "both the substance and the appearance of justice." (Pet. App. A 4a; J.A. 947.) Hunt thereupon agreed to plead guilty to all charges and underwent extensive questioning by Judge Sirica, in which he affirmed that he had committed all the crimes charged, he was pleading guilty knowingly and voluntarily, and he was entirely satisfied with Bittman's representation of him. (Pet. App. A 4a.) Judge Sirica accepted the guilty plea on January 11, 1973. (Pet. App. A 4a.)

Hunt was provisionally sentenced to prison by Judge Sirica on March 23, 1973, after once again acknowledging his guilt and reaffirming the voluntariness of his guilty plea; he was incarcerated immediately following the sentencing. (Pet. App. A 4a.) Respondents' representation of him ended on August 16, 1973. Thereafter, represented by successor counsel, Hunt attempted to withdraw his plea and have the indictment dismissed. Judge Sirica denied the motion and, on November 9, 1973, imposed final sentence on Hunt. (Pet. App. A 4a-5a.)

Hunt, represented by still another set of successor counsel, appealed Judge Sirica's decision denying his motion to withdraw the plea and dismiss the indictment; far from being "helplessly incarcerated" (Pet. 3), he was free on bond for well over a year while his appeal was pending.[2] (Pet. App. A 5a.) The *en banc* Court of Appeals in February 1975 unanimously affirmed Judge Sirica's decision in a *per curiam* decision, observing that Hunt's attack on the validity of his plea and conviction "hardly needs to be taken seriously." *United States* v. *Hunt*, *supra*, 168 U.S. App. D.C. at 375 n.3, 514 F.2d at 271 n.3.[3] The Court of Appeals did vacate the sentence on the three counts the prosecution had agreed to dismiss and, in effect, reinstated the original plea bargain negotiated by Bittman on Hunt's behalf. (Pet. App. A 5a n.16.)

### 3. The District Court Opinion

The parties have agreed throughout the litigation that the governing statute of limitations was the provision of D.C. Code §12-301(8), providing a three-year limitations period "from the time the right to maintain the action accrues." There was no dispute then, or now, that this "local law" of the District of Columbia applied; that the sole jurisdictional basis for the claim of legal malpractice was diversity of citizenship and the question was solely one of D.C. law; and that the Court's task was to determine the applicability of the D.C. statute to Hunt's claim. (*See* Pet. App. A 7a n.20.)

[2] Hunt had counsel at all times during his incarceration, during the lengthy period he was free on bail pending appeal, and during the period preceding the filing of his suit.

[3] Hunt's assertion, repeated in his Petition here (Pet. 2), that he believed he was acting pursuant to Presidential authority in the Watergate break-in, was rejected by Judge Sirica, whose decision was affirmed by the Court of Appeals.

Judge Gasch proceeded to do just that, analyzing the relevant precedents under the applicable D.C. Code provision in the U.S. Court of Appeals for the D.C. Circuit and the District of Columbia Court of Appeals, the highest court of the District of Columbia. Judge Gasch concluded that these governing precedents were entirely consistent. Both the U.S. Court of Appeals for the D.C. Circuit in *Fort Myers Seafood Packers, Inc.* v. *Steptoe & Johnson*, 127 U.S. App. D.C. 93, 94, 381 F.2d 261, 262 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1968), and the District of Columbia Court of Appeals in *Weisberg* v. *Williams, Connolly & Califano*, 390 A.2d 992, 994, 995 & n.5 (D.C. Ct. App. 1978), follow the same rule for determining when a claim for legal malpractice "accrues" under the applicable provision of the D.C. Code — the so-called "injury" rule in which the claim "accrues" when the plaintiff suffers actual injury. (Pet. App. A 7a-8a.)

Petitioner is flatly incorrect in stating (Pet. 3-4) that Judge Gasch "fashioned a special rule for [respondents'] protection, applicable only in the case of *legal* practitioners in the District of Columbia, and different from the rule which governs all other litigants there." (Emphasis in original.) Judge Gasch did no such thing, as his opinion makes clear. He fashioned no new or special rule for lawyers. He followed the authoritative and well-established precedents in both the U.S. Court of Appeals and the D.C. Court of Appeals. (Pet. App. A 7a-8a.) Moreover, he did not single out lawyers for special treatment from all other litigants — he cited both the U.S. Court of Appeals and the D.C. Court of Appeals decisions holding that "the same principles should govern the accrual of a legal malpractice claim as govern ordinary negligence claims." (Pet. App. A 8a n.22.)

Petitioner is also incorrect in stating that the District Court "held, in effect, that for petitioner Hunt the time-bar commenced to run when he was injured, without regard to whether he knew or should have known of the injury at the time it was inflicted. . . ." (Pet. 4.) Since the Court determined (Pet. App. A 10a-11a) that Hunt's injury was his incarceration pursuant to Judge Sirica's sentence on March 23, 1973, he was necessarily aware of having sustained injury at that time, and nothing more was required to commence the running of the statute. Moreover, Judge Gasch, in his care to deal with each of Hunt's contentions, went on to analyze in detail each of Hunt's specific allegations against respondents and each of the claims of fraudulent concealment by which he tried to avoid the bar of the statute. The District Court concluded that Hunt knew of every allegation of inadequate representation and every other claim of malpractice more than three years before he brought suit (Pet. App. A 12a, 16a-17a) and that the claims of fraudulent concealment were equally deficient because of Hunt's knowledge of the matters relied on. (Pet. App. A 18a.)[4]

In sum, the District Court held, on the basis of undisputed matters of public record in judicial proceedings, Hunt's own statements and admissions, and contemporaneous documents, that Hunt had actual knowledge of his cause of action well over three years before his suit was commenced. (Pet. App. A 18a.)

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[4] The injury-fraudulent concealment analysis applied by Judge Gasch, the D.C. Court of Appeals, and the U.S. Court of Appeals was thus equivalent in this case to the so-called "discovery" rule for which petitioner contended, and the same result follows in his case whichever rule is applied.

**4. The Court Of Appeals Decision**

The unanimous *per curiam* affirmance by the Court of Appeals, JJ. Wright, Tamm, and Ginsburg, was rendered after extensive briefing by the parties, oral argument, and "full consideration by the court." (Pet. App. B 1b.) In affirming the decision below, the Court relied upon its Local Rule 13(c), which allows the Court to dispense with written opinions in appropriate cases.

The Court, after reviewing the "District Court's painstaking opinion" and the extensive record on appeal, concluded that the District Court had properly applied the governing principles in its disposition of petitioner's case; it determined that "the issues presented occasion no need for an opinion." (Pet. App. B 1b-2b.) No question of general applicability was discerned by any member of the panel, nor did any of the ten active judges of the full Court even request a vote on the suggestion for rehearing *en banc.*

**REASONS FOR DENYING THE WRIT**

None of the criteria enumerated by this Court (*see* Supreme Court Rule 17) for discretionary review on *certiorari* of the decision of a federal court of appeals is remotely approached here. The narrow and particularized question of local law application involved here does not warrant consideration by this Court.

1. Petitioner concedes that this case does not involve a conflict of circuits. (Pet. 5; and *see* Rule 17.1(a) of this Court's Rules.) No such conflict could arise, since the issue is only the application of a D.C. statute of limitations provision to a case brought in the District of Columbia.

Nor is there a conflict as to a question of federal law asserted between the U.S. Court of Appeals for the D.C. Circuit and the District of Columbia Court of Appeals. To the contrary, the decisions of the U.S. Court of Appeals for the D.C. Circuit and the D.C. Court of Appeals are entirely consistent, as Judge Gasch found after careful analysis. The D.C. Court of Appeals (in *Weisberg*, *supra*) approvingly cited the decision of the U.S. Court of Appeals in *Fort Myers Seafood Packers*, *supra*, on the "accrual" of claims for legal malpractice under the D.C. statute, and Judge Gasch cited and followed the decisions of both Courts. (Pet. App. A 7a-12a.) The decision of the U.S. Court of Appeals upholding Judge Gasch's decision means that there is uniformity and consistency between the local and federal courts in the District of Columbia in interpreting this provision of D.C. law, just as there should be.

2. There is no important question of federal law here requiring settlement by this Court. Indeed, there is no question of federal law of general applicability in the federal system, much less any issue of importance. The only issue relates to the application of a provision of a D.C. statute of limitations to a particular lawsuit. Petitioner concedes that the question is one of "local law." (Pet. 5.) There were no federal constitutional issues raised at any point in the proceedings, nor were any such issues decided by the Courts below. As petitioner further concedes (Pet. 5), there are no conflicts of authority at all, much less a conflict with any applicable decision of this Court.[5]

[5] Earlier this year this Court denied *certiorari* in another legal malpractice suit brought by another convicted Watergate conspirator, James McCord, against his former lawyers. *McCord* v. *Bailey*, No. 80-1167, 49 U.S.L.W. 3863 (May 19, 1981). Represented by the same counsel as Hunt, the petitioner in that case made virtually identical allegations in his complaint.

This Court has consistently adhered to the principle that decisions on issues of such localized character by the courts of the District of Columbia do not merit review by this Court. As the Court stated in *Pernell* v. *Southall Realty*, 416 U.S. 363, 366 (1974):

> "This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application."

*See also General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 556 (1965) ("We are normally content to leave undisturbed decisions by the Court of Appeals for the District of Columbia Circuit" concerning local legislation.).

That this case involves no issue of general importance was recognized by the Court of Appeals when it stated that the issues presented "occasion no need for an opinion" in accordance with its Local Rule 13(c). (Pet. App. B 1b.)

3. There is no need or occasion to reargue here the correctness of Judge Gasch's decision or that of the Court of Appeals affirming it. Suffice it to say that a District Judge of long experience gave all parties "a full and fair opportunity to submit all materials pertinent to this issue" (Pet. App. A 2a n.2) and to be heard on it; he dealt comprehensively and carefully with each of petitioner's contentions; he analyzed the controlling legal authorities and painstakingly applied them to the issue before him; and a Court of Appeals of wide and diverse experience unanimously agreed that his decision was so clearly correct as not even to require discussion in an opinion. The case was a model of fair and efficient decisionmaking at both the trial and appellate levels, and

every judge who has scrutinized the issue has come to the same conclusion that petitioner's suit was barred by the local statute of limitations.

## CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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